



## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Administration for Children and Families**

#### **45 CFR Part 1336**

#### **RIN 0970-AC88**

### **Native American Programs**

**AGENCY:** Administration for Native Americans (ANA), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule provides a process for ANA grant recipients to request a waiver for part or all of their non-Federal cost share or match (NFS) during a budget period due to emergency circumstances.

**DATES:** This rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Carmelia Strickland, Administration for Native Americans, 202-401-6741. Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern Time.

### **SUPPLEMENTARY INFORMATION:**

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### **I. Background**

#### *Native American Programs Act of 1974*

The Native American Programs Act of 1974 (NAPA), Public Law 93-644, was first enacted on January 4, 1975. The last time substantial amendments to the NAPA regulations were made was 1996. Section 802 of the NAPA establishes as its broad statutory purpose the promotion of “the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives.” ANA executes this purpose through the provision of project-based financial assistance to Native Americans authorized under sections 803 and 803C of the NAPA, as well as through advocacy on behalf of Native Americans within HHS and with other departments and agencies of the Federal Government “regarding all Federal policies affecting Native Americans,” under section 803B(c) of the NAPA.

*Goal of This Final Rule: Incorporation of Emergency Waiver Provision*

On December 7, 2021, ANA published a notice of proposed rulemaking (NPRM) to update existing waiver requirements to allow an opportunity to request a waiver of the non-Federal cost share (NFS) in the event of an emergency. 86 FR 69215. The NAPA requires applicants and recipients to provide an NFS of 20 percent of project costs, unless waived by the Commissioner of ANA pursuant to objective criteria established by regulation. Current regulations (45 CFR 1336.50) only permit “applicants” to apply for a waiver of the NFS, which ANA has interpreted as applicants for the initial awards and applicants for non-competing continuation (NCC) awards. The on-going public health emergency has greatly impacted ANA recipients. The pandemic has greatly increased the risk of language and cultural decline among Native communities with many Elders dying from the COVID-19 virus. As tribes began closing their revenue-generating businesses and other governmental operations due to the COVID-19 pandemic, they lost income and in-kind contributions they needed to fund Federal projects requiring a NFS. In addition, planned sources of match support, such as use of tribal-owned facilities from which to operate the project, as part of the NFS, also diminished. ANA’s current cost-share waiver does not allow for a process to address a recipient’s inability to meet the cost-share due to an emergency in the middle of a budget period. This final rule adds a provision (45 CFR 1336.50(b)(2)(ii)) allowing grant recipients to apply for an emergency waiver within the current budget period to remedy this burden.

## **II. Statutory Authority**

Pursuant to 42 U.S.C. 2991b of the NAPA, ANA is authorized to allow applicants the ability to submit a request for a waiver of the required 20 percent non-Federal cost share or match, subject to ANA regulations.

## **III. Discussion of Changes from the NPRM to Final Rule**

The changes made in this final regulation, as compared with the proposed rule, are as follows:

1. The final rule amends the word “follow” to the word “following” in 45 CFR 1336.50(b)(2). The change fixes a typographical error in the NPRM.
2. The final rule removes the word “temporarily” in 45 CFR 1336.50(b)(2)(i). The word had been added to the regulation in the proposed rule to indicate that applicants who sought a waiver would have to apply for the waiver again when applying for the NCC award. But upon further review, ANA believes the word adds confusion rather than clarity. The removal does not change ANA’s process or the substance of the rule.
3. The final rule adds the word “recipient(s)” in 45 CFR 1336.50(b)(2) and (3). The NPRM proposed to add an option for recipients to apply for a waiver but did not add the word recipient to the other paragraphs that cover waiver applications. The final rule adds the word “recipient” to make clear that these sections on waivers cover both applicants and recipients.
4. The final rule adds text in 45 CFR 1336.50(b)(2)(i) that both an applicant for an initial award and an applicant for an NCC award can apply for a waiver. The final rule adds this text to set out explicitly ANA’s interpretation of the current rule and the intention of the NPRM.
5. The final rule changes the NPRM use of the word “should” to “can” in 45 CFR 1336.50(b)(3)(ii). The current regulations use the word “can” in § 1336.50(b)(3)(ii). Changing the word to “should” was a drafting error that inadvertently changed the meaning of one of the criteria of the waiver. ANA never intended to change the criteria for the waiver and the final rule ensures that the criteria remain unchanged.

#### **IV. Discussion of the Final Rule**

This final rule makes changes to 45 CFR part 1336, subpart E, Financial Assistance Provisions, in § 1336.50. These changes will have no regulatory burden impact but will provide a waiver provision and ensure programmatic success of American Indian, Native

Hawaiian, other Native American Pacific Islander (including American Samoan Natives), and Alaska Native–based recipients.

*Section 1336.50 Financial and Administrative Requirements.*

Recipients of financial assistance under sections 803, 804, and 805 of NAPA are required to provide a matching share of 20 percent of the approved cost of the assisted project.

Title 45 CFR 1335.50(b)(2) and (3) provide a process for requesting a waiver for the match. The final rule makes several changes to the language in these paragraphs.

The final rule amends the existing language and application requirements under § 1336.50(b)(2) to provide additional detail. Specifically, § 1336.50(b)(2)(i) will require that if an applicant anticipates that they will be unable to meet the cost-sharing or matching requirement and wishes to request a waiver of the requirement, they must include with the application for funding a written justification that clearly explains why the applicant cannot provide the matching share, including the amount of non-Federal share to be waived and supporting evidence for how it meets the criteria indicated in the revised § 1336.50(b)(3)(ii). The request for a waiver must be submitted at the time of the initial application or NCC application.

The final rule makes two changes from the current version of § 1336.50(b)(2)(i). The final rule adds that the written justification for the waiver must include the amount of the NFS to be waived. This addition reflects how the agency handles waiver requests in practice because not every applicant will need a waiver of the full 20 percent match requirement. The final rule also states that either an applicant for the initial award or an applicant for the NCC can apply for the waiver, which is how ANA currently interprets the regulations. All these additions are statements of current practice and not substantive amendments to the waiver procedure.

The final rule adds a provision for an emergency waiver in § 1336.50(b)(2)(ii) to include the ability to request a waiver during the budget period. If a recipient is unable to contribute part or all of the required non-Federal matching share during a budget period due to an emergency such as a natural disaster, man-made disaster, act of terrorism, public health emergency, or other qualifying event, the recipient may request a waiver of all or part of the requirement for a 20 percent non-Federal matching share specified under § 1336.50(b)(1). ANA has included “other qualifying event” to encompass events, like the pandemic, that cannot be foreseen by ANA at this time but could abruptly cause the recipient to be unable to meet the match requirement.

Finally, this final rule amends the language in § 1336.50(b)(3)(ii). The criteria to be approved for a waiver is not changed by this rule. Recipients document that reasonable efforts to obtain cash or in-kind contributions for the purposes of the project from third parties have been unsuccessful, including evidence and the results of such attempts. Evidence of such efforts can include letters from possible sources of funding or any relevant correspondence, indicating that the requested resources are not available for that project. The requests must be appropriate to the source in terms of project purpose, applicant eligibility, and reasonableness of the request. This section added “any relevant correspondence” to indicate that relevant correspondence can be sent in any form other than a letter.

## **V. Comments Received and Response**

ANA received comments from a federally recognized tribe, an individual, and an anonymous commenter. All comments were positive in support of the amended regulation to allow for a process for recipients to request a NFS waiver during the budget period if they are experiencing an emergency such as the COVID-19 pandemic.

Comment: An emergency waiver “would encourage tribes to continue language, cultural and unique economic development programs that would otherwise be postponed or cancelled.”

Response: ANA concurs.

Comment: Two comments opposed the requirement that applicants or recipients seeking a waiver provide documentation of unsuccessful efforts to obtain cash or in-kind contributions for the project.

Response: This requirement is an existing criteria for NFS waiver. The final rule does not modify the existing criteria in the regulations.

## **VI. Regulatory Process Matters**

### *Paperwork Reduction Act of 1995*

Section 1336.50(b) does not contain new information collection requirements. This action does not include any information collection requirements, only an additional circumstance that would allow for the submission of the information already outlined in the regulation.

### *Regulatory Flexibility Act*

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Public Law 96-354), that this rule will not result in a significant impact on a substantial number of small entities.

### *Treasury and General Government Appropriations Act of 1999*

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency’s determination is affirmative, then the agency

must prepare an impact assessment addressing criteria specified in the law. This regulation will not have an impact on family well-being as defined in this legislation, which asks agencies to assess policies with respect to whether the policy strengthens or erodes family stability and the authority and rights of parents in the education, nurturing, and supervision of their children; helps the family perform its functions; and increases or decreases disposable income.

#### *Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure in any one year by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million (1995 dollars), updated annually for inflation. The 2022 threshold is approximately \$165 million. The Department has determined that this rule would not impose a mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of more than \$165 million in any one year.

#### *Federalism Assessment Executive Order 13132*

Executive Order 13132 on federalism applies to policies that have federalism implications, defined as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This rulemaking does not have federalism implications for state or local governments as defined in the Executive order.



## *Congressional Review*

This regulation is not a major rule as defined in 5 U.S.C. 804.

## *Executive Orders 12866 and 13563 – Regulatory Impact Analysis*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select the regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity).

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. While there are some costs associated with these regulations, they are not economically significant as defined under Executive Order 12866. However, the regulation is significant and has been reviewed by Office of Management and Budget.

The regulation change will benefit recipients that have been financially impacted by an emergency event and are unable to meet their matching cost requirement, as required by the grant award. It would reduce the financial burden to recipients that need a waiver to provide the 20 percent cost share. To the extent that this final rule results in transfers, they will not exceed the threshold for economic significance because the total funding level for the program is below the threshold. Also, there is no cost to the agency other than the administrative time that it would take to review and if approved, process the waiver request.

January Contreras, Assistant Secretary of the Administration for Children and Families, approved this document on January 24, 2023.

**List of Subjects in 45 CFR Part 1336**

Disaster assistance, Emergency preparedness, Native Americans, Public health.

Dated: February 22, 2023.

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**Xavier Becerra**

*Secretary,*

*Department of Health and Human Services.*

For the reasons stated in the preamble, we amend 45 CFR part 1336 as follows:

## **PART 1336 – NATIVE AMERICAN PROGRAMS**

1. The authority citation for part 1336 continues to read as follows:

**Authority:** 42 U.S.C. 2991 *et seq.*

2. Amend § 1336.50 by revising paragraphs (b)(2) and (3) to read as follows:

### **§ 1336.50 Financial and administrative requirements.**

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(b) \*\*\*

(2) *Application.* If an applicant or recipient wishes to request a waiver of the requirement for a 20 percent non-Federal matching share, the following conditions must be met:

(i) If an applicant for an initial award or an applicant for a non-competing continuation award anticipates that it will be unable to meet the cost-sharing or matching requirement, the applicant may request a waiver of the 20 percent non-Federal matching share. It must include with its application for funding, the submission of a revised SF424A, a written justification that clearly explains why the applicant cannot provide the matching share including the amount of non-Federal share to be waived, and how it meets the criteria indicated in paragraph (b)(3) of this section. For an applicant for an initial award, or an applicant seeking a non-competing continuation award, a request for a waiver must be submitted at the time of the initial application or non-competing continuation (NCC) application.

(ii) If a recipient is unable to contribute part or all of the required non-Federal matching share during a budget period due to an emergency situation such as a natural disaster, man-made disaster, act of terrorism, public health emergency, or other qualifying event, the recipient may request a waiver of all or part of the requirement for a 20 percent non-Federal matching share specified under paragraph (b)(1) of this section. Any requests for

an emergency waiver may be submitted at any time during a budget period as soon as the adverse effect is known to the recipient and must be submitted in accordance with the requirements specified in paragraph (b)(3) of this section.

(3) *Criteria.* Both of the following criteria must be met for an applicant or recipient to be eligible for a waiver of the non-Federal matching requirement:

(i) Applicant or recipient lacks the available resources to meet part or all of the non-Federal matching requirement. This must be documented by an institutional audit if available, or a full disclosure of applicant's or recipient's total assets and liabilities.

(ii) Applicants or recipients can document that reasonable efforts to obtain cash or in-kind contributions for the purposes of the project from third parties have been unsuccessful, including evidence and the results of such attempts. Evidence of such efforts can include letters from possible sources of funding or any relevant correspondence, indicating that the requested resources are not available for that project. The requests must be appropriate to the source in terms of project purpose, applicant eligibility, and reasonableness of the request.

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